IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3623 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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MAHENDRASINH PRABHATSINH VAGHELA

Versus

DISTRICT MAGISTRATE

Appearance:

1. Special Civil Application No. 3623 of 2001

MR BC DAVE for Petitioner No. 1

MR HL JANI ASSTT GOVERNMENT PLEADER for Respondent No. 1-2,4

MS PJ DAVAWALA for Respondent No. 3

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 12/07/2001

ORAL JUDGEMENT

#. Heard Mr.B.C.Dave, learned advocate appearing on behalf of the petitioner and Mr.H.L.Jani, learned AGP appearing on behalf of the respondent Nos.1, 2 and 4 so also Ms.Parinda Dawawala, learned Additional Standing

Counsel for the Central Government - respondent No.3. In the present petition, the petitioner has challenged the order the detention order dated 23rd February, 2001 which actually effected on 27th February, 2001 under Article 226 of the Constitution of India. The order of detention has been passed by the District Magistrate, Junagadh District under the provisions of Section 3[2] of the PBM Act. The grounds of detention are communicated and supplied to the present petitioner under Section 8[1] of the PBM Act. The present petitioner has been detained in custody of District Jail Nadiad as Class-II detenu.

#. Learned advocate Mr.B.C.Dave appearing on behalf of the petitioner has raised various contentions challenging the detention order but according to his submission, one or two contentions are enough to vitiate the order of detention. The first contention which has been raised by him that in pursuance of the detention order which has been passed against present petitioner, the petitioner who was employee of the Gujarat Fisheries Central Cooperative Association Limited has been suspended from service by order dated 27th February, 2001. Therefore, he submitted that after suspension, there was no scope for the petitioner to indulge into such illegal activities which is alleged against the present petitioner. This aspect has not been taken into account by the detaining authority while passing the detention order. Not only that this contention has been specifically raised by the petitioner in the representation dated 13th March, 2001 in para-7 of the representation. But while considering the representation, this contention of the present petitioner has not been taken into account by the concerned authority. The second contention which has been raised by the learned advocate Mr.B.C.Dave that along with grounds of detention, certain necessary papers which have been relied and relevant and considered by the detaining authority has not been supplied to the present petitioner. Therefore, it amounts to non supply of the grounds of detention to the petitioner and the same were supplied to the petitioner by letter dated 16th march, 2001 as per para-3 and therefore, he submitted that not to supply relevant documents which has been relied by the detaining authority while passing the detention order, which has adversely affected the right of the present petitioner for making effective representation under Article 22[5] of the Constitution of India. Therefore, he submitted that specific contention has been raised by the petitioner in para-7 of the petitioner. He also pointed out that even according to the statutory provisions of PBM Act, under sub-section [3] of Section

3, the detaining authority shall forthwith report the fact to the State Government about the order of detention along with such other particulars. Therefore also, the grounds of detention are not supplied in time and there was delay and therefore also the order of detention is required to be set aside. So far as suspension of the present petitioner being an employee, a specific contention has been raised by the petitioner in para-5 of the petition. Mr.B.C.Dave, learned advocate has relied upon three decisions of the Apex Court, which are as under :-

[1] AIR 1981 S.C. 431
[2] AIR 1980 SC 1983
[3] 1999 SCC pg.593.

#. Learned AGP Mr.H.L.Jani appearing on behalf of the respondents has submitted that the detaining authority the District Magistrate - respondent No.1 has filed a detailed reply and the State Government has also filed a detailed reply to the present petition. Mr.H.L.Jani, learned AGP has submitted that in respect of the reply to para-5 pg.24, wherein the detaining authority has submitted suspension order has been passed by the competent authority under the Service Rules and therefore, the petitioner cannot be released from the detention. So far the contentions in para-7 of the petition, the detaining authority has in the reply has submitted that the order of detention has been passed after considering the documents and papers which were referred to and relied upon by him and after arriving at subjective satisfaction. He also submitted that grounds of detention have been supplied with all the relevant papers and documents running from pg.1 to 95 but pursuant to the demand of the petitioner dated 13th March, 2001, same has been supplied by letter dated 16th March, 2001 which has been received by the petitioner through the Jail Superintendent and confirmation has also been received by the detaining authority from the jail authority on date 19th March, 2001. Therefore, documents are required to be furnished as per the demand of the petitioner and accordingly, the same has been supplied to the petitioner. In light of this submission, learned AGP Mr.H. L.Jani has submitted that the grounds of detention has been supplied in time and on demand, subsequently also necessary documents have been supplied to the petitioner and therefore, there is no illegality in passing the orders of the detention and looking to the facts on record as well as the material which was placed before the detaining authority, the detaining authority has rightly passed the detention order which is legal and

valid and therefore no interference of this court is required.

#. Learned Advocate Ms.P.J.Dawawala appearing on behalf of the respondent No.3 - Union of India has supported the order of detention and pointed out that in light of the materials which are on record and looking to the grounds of detention, the order of detention has been rightly passed by the detaining authority and the same has been approved by the State Government on 5th march, 2001 with stipulated period of 12 days as per the provisions of the Act and thereafter, Central Government has also approved the same and representation which was filed by the petitioner is rightly rejected by the concerned authority. Therefore, she also submitted that no interference of this Court is required in this case.

#. I have considered the submissions of learned advocates for the respective parties. The first contention which has been raised by the learned advocate Mr.B.C.Dave that after detention which has been passed against the present petitioner who was the employee of the Society, has bene suspended by order dated 27th February, 2001 and therefore in representation dated 13th March, 2001, this contention was raised that now the petitioner has been suspended and therefore there was no necessity to continue the detention of the petitioner because after suspension the petitioner was not able to indulge into similar activities alleged against the present petitioner. This contention has been specifically raised by the petitioner in para-7 of the representation but the concerned authority has not decided the same and remained unanswered. However, considering this fact, according to my opinion, it is vital and the same was required to be taken into account by the concerned authority while deciding the representation that after suspension from the service, continued detention of the present petitioner is unwarranted. The purpose behind passing the order of detention just to prevent the petitioner from not indulging in similar activities contrary to the statutory provisions of PBM Act and Essential Commodities Act. But after suspension, naturally, the petitioner is not able to perform such duties and could not have indulged into similar activities being the employee of the Society. This aspect has not been taken into account while rejecting the representation filed by the petitioner. Considering the reply which has been given by the detaining authority, even by the State Government, there is no specific answer given by either of the detaining authority or the State Government that why this question

which has been raised in the representation about the suspension of the petitioner, was not taken into account and therefore, according to my opinion, this is vital issued while considering the object of preventive detention and especially after the suspension, the present petitioner was not able to perform or discharge or indulge the same activities. Therefore, subsequent to suspension of the present petitioner from the service, continued detention, according to my opinion, stands vitiated and the concerned authority has not applied the mind while considering the representation of the petitioner. Therefore, there is no application of mind by the concerned authority who has decided the representation, clearly ignored the contention which has been raised by the petitioner in para-7 of the representation. Therefore, according to my opinion, the order of detention requires to be quashed and set aside.

#. So far as the second contention is concerned that along with grounds of detention, the documents which have relied and referred to by the detaining authority, were not supplied and pursuant to the request of the petitioner dated 13th March, 2001, said documents were supplied by the detaining authority by letter dated 16th march, 2001 supplied the necessary documents to the present petitioner. But whether supply of documents subsequently to the petitioner, will adversly affect the right of the petitioner to make effective representation as provided under Article 22[5] of the Constitution of India or not is required to be considered. In light of this submission, some observations made by the Apex Court in case of ICHHUDEVI CHORARIA VS. UNION OF INDIA reported in AIR 1980 SC p.1963 are necessary to quote here, which runs as under :-

> The detenu was taken under detention on 4th June, 1980 by an order of detention dated 27th May, 1980. The order of detention recited that with a view to preventing him from smuggling goods and abetting the smuggling of goods it was necessary to detain him. After detention he was also served on the same day, the grounds of detention. The grounds of detention referred to several documents and statements including two tape recorded conversations. The detenu addressed a letter dated 6th June, 1980 asking for all statements, documents and material to enable him to make an effective representation against his detention. The detenu also sent a representation dated 9th June, 1980 to the Deputy Secretary once again requesting him to supply immediately the

documents etc. relied upon in the grounds of detention and to furnish the transcripts of the tapes as also to produce the original tapes, so that he could prove that the voice recorded on the tapes was not his. The detenu addressed another representation dated 26th June, 1980 to the Chairman of the Advisory Board, the Central Government and the Deputy Secretary to the State Government praying for revocation of the order of detention, wherein he pointed out that by his letters dated 5th, 9th and 14th June, 1980, he had requested for the tapes to be supplied to enable him to prove that the voice recorded on the tapes was not his and that this request had not been complied with and in the circumstances the hearing of the case before the Advisory Board would be futile. Meanwhile the Investigating Officer of the Customs Department was deputed to the Central Prison alongwith the tapes, and the tapes were played in the presence of the detenu and the Deputy Superintendent of the Central Prison on 8th July, 1980. The representations of the detenu were examined by the government, who by their letter dated 15th July, 1980 rejected the representations and declined to revoke the order of detention.

In the writ petition under Article 32 of the Constitution filed by the mother of the detenu it was contended: (1) that the detaining authority did not serve on the detenu alongwith the grounds of detention, copies of the statements, documents and tapes referred to in the grounds of detention and it could not, therefore, be said that the grounds of detention were duly served on the detenu as required by sub-section (3) of section 3 of the COFEPOSA Act and clause (5) of Article 22 of the Constitution, and (2) that the detaining authority did not supply copies of such statements, documents and materials until 11th July, 1980 and on that day also, what were supplied were merely copies of the statements and documents and not copies of the tapes which were supplied only on 20th July, 1980 and that this delay was wholly unjustified and the detenu was thus denied the earliest opportunity of making an effective representation and consequently the continued detention of the detenu was illegal and void.

Reliance is also placed one another decision in

case of SMT SHALINI SONI ETC. VS. UNION OF INDIA reported in AIR 1981 SC p.431.

(1) The representation by the detenu under the COFEPOSA has not to be made in any prescribed form. There is no formula nor any magical incantation like "open seasame" to be repeated or chanted in order to qualify a communication as a representation. So long as it contains a demand or a request for the release of the detenu in whatever form or language couched and a ground or a reason is mentioned or suggested for such release, there is no option but to consider and deal with it as a representation for the purpose of Article 22(5) of the Constitution. [965DE]

In the instant case the communication dated July 27, 1980 by the counsel for the detenu in W.P. 4344 of 1980 was a representation which was in law required to be considered. The said representation admittedly not having been considered the detenu was entitled to be set at liberty. [965H-966A, C]

(2)The obligation imposed on the detaining authority, by Article 22(5) of the Constitution, to afford to the detenu the earliest opportunity of making a representation, carries with it the imperative implication that the representation shall be considered at the earliest opportunity. Since all the constitutional protection that a detenu can claim is the little that is afforded by the procedural safeguards prescribed by Article 22(5) read with Article 19, the Courts have a duty to rigidly insist that preventive detention procedures be fair and strictly observed. A breach of the procedural imperative must lead to the release of the detenu. [966B]

(3)Article 22(5) has two facets: (i) communication of the grounds on which the order of detention has been made; (ii) opportunity of making a representation against the order of detention. Communication of the grounds presupposes the formulation of the grounds and formulation of the grounds requires and ensures the application of the mind of the detaining authority to the facts and materials before it, that is to say, to pertinent and proximate matters in regard to each individual case and excludes the elements of arbitrariness and

automatism. [966G]

(4) It is an unwritten rule of the law, constitutional and administrative, what whenever a decision making function is entrusted to the subjective satisfaction of a statutory functionary, there is an implicit obligation to apply his mind to pertinent and proximate matters only, eschewing the irrelevant and the remote. Where there is further an express statutory obligation to communicate not merely the decision but the grounds on which the decision is founded, it is a necessary corollary that the grounds communicated, that is, the grounds so made known, should be seen to pertain to pertinent and proximate matters and should comprise all the constituent facts and materials that went in to make up the mind of the statutory functionary and not merely the inferential conclusions. Now, the decision to detain a person depends on subjective satisfaction of the detaining authority. The Constitution and the statute cast a duty on the detaining authority to communicate the grounds of detaining to the detenu. The grounds communicated must reveal the whole of the factual material considered by the detaining authority and not merely the inferences of fact arrived at. The same result would follow if the matter is looked at from the point of view of the second facet of Art. 22(5), namely the opportunity to make a representation against the order of detention. [966H-D]

(5)The "grounds" under Article 22(5) of the Constitution do not mean mere factual inferences but mean factual inferences plus factual material which led to such factual inferences. The "grounds" must be self-sufficient and self-explanatory. Copies of documents to which reference is made in the "grounds" must be supplied to the detenu as part of the "grounds". [1967E-F]

Smt. Icchu Devi Choraria v. Union of India & Ors., [1981] 1 S.C.R. p. 642, explained and followed.

The third decision relied upon is in case of SOPHIA GULAM MOHD. BHAM VS. STATE OF MAHARASHTRA reported in 1999 [6] SCC p.593. The relevant observations in para-11 are quoted as under :-

"11. Now, an effective representation can be made against the order of detention only when copies of the material documents which were considered and relied upon by the detaining authority in forming his opinion that the detention of Bham Faisal Gulam Mahammed was necessary, were supplied to him. It is only when he has looked into those documents, read and understood their contents that it can be said that the detenu can make an effective representation to the detaining authority, State or Central Government, as laid down in Article 22[5] of the Constitution which provides as under :

"22.[5] When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order."

#. In light of above observations made by the apex court and considering the facts and circumstances of the present case that documents which were supplied to the petitioner along with grounds of detention and after considerable delay for about more than one month on 16th March, 2001, the same were supplied, obviously adversely affected the legal right of the petitioner of making effective representation under Article 22[5] of the Constitution of India. It is also noted that even according to the provisions of Section 8 of the PBM, there is statutory requirement to communicate and supply the grounds of detention to the detenu as soon as may be immediately but ordinarily not later than 5 days and in exceptional circumstances and for the reasons recorded in writing not later than 10 days from the detention communicating the grounds on which the order has been made and shall afford him an earliest opportunity of making a representation against the order of detention. These are the statutory requirements under Section 8[1] of PBM Act but in the instant case, the order of detention dated 23rd February, 2001 actually effected on 27th February, 2001 and the documents were supplied to the petitioner on 16th March, 2001 which is not disputed between the parties and therefore, according to my opinion, non supply of grounds along with relevant documents which have been relied upon and referred to by

the detaining authority, has certainly affected adversely the legal and fundamental right of the present petitioner from making an effective representation before appropriate Government Authority under Article 22[5] of the Constitution of India. Therefore, the order of detention is required to be quashed and set aside.

#. In the result, the present petition is allowed. The order of detention dated 23rd February, 2001 which has been actually effected on 27th February, 2001 passed by the District Magistrate, Junagadh District is hereby quashed and set aside. The present petitioner - detenu - Mahendrasinh Prabhatsinh Vaghela who has been detained at Nadiad District Jail is ordered to be set at liberty immediately if he is not required in any other case. Rule is made absolute accordingly.

Date : 12-7-2001 [H.K.Rathod, J.]

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